THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CRIMINAL APPEAL NO.66 OF 2022

(Originates from criminal case No. 83/2021 at Mvomero District Court)

LEONS PAULO @ SHOBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing on: 21/6/2023

Judgement on: 10/7/2023

NGWEMBE, J:

The Appellant found himself in jail for life after being convicted for the offence of unnatural contrary to section 154 (1)(a) and (2) of the Penal Code [CAP. 16 R.E 2019]. The appellant **Leons Paulo @ Shobo** was aggrieved with that conviction and sentence, just eight (8) days after delivery of the convicting judgement, he issued notice of intention to appeal and finally, successfully appealed to this house of justice grounded with five (5) grievances.

For convenient purposes, the historical journey of the appellant to life imprisonment commenced on 6th October, 2021 at Tchenzema Village,

Mgeta division within Mvomero district in Morogoro Region, where the appellant was alleged to have carnal knowledge against order of nature with a boy of eleven (11) years (his name is concealed because of age) contrary to section 154 (1) (a) and (2) of the Penal Code. At trial, the prosecution lined up four (4) prosecution witnesses who were all relatives that is, his father and Mother and the victim himself. The medical doctor appeared in court to provide his expertise opinion on his findings upon diagnosing the victim's anus, all appears as PW1, PW2, PW3 and PW4 respectively and one witness statement of G. 9600 Shakiru, a police officer.

In turn the defence case was defended by the appellant alone. Thus, at the end, the trial court found the appellant liable to the offence charged hence proceeded to convict him and subsequently pronounced a life sentence. Being dissatisfied with both conviction and sentence, the appellant found his way to this house of justice armed with the following grounds: -

1. That the trial Magistrate erred in law and fact by not considering the defence of ALIBI as raised by the appellant.
2. That the trial magistrate erred in law and fact by not according the appellant the chance for mitigation.
3. That, the trial magistrate erred in law and fact by not showing the reasons for judgement.
4. That, the trial magistrate erred in law and fact by considering weak evidence of the respondent which was not corroborative neither supportive.

5. That the trial magistrate erred in law and fact by basing on hearsay evidence to arrive on the judgement.

On the hearing date of this appeal, fortunately the appellant had legal representation from learned advocate Samwel Banzi, while the Republic was represented by learned State Attorney Mary Lundu.

In arguing the appeal, Mr. Banzi submitted generally on all five grounds without following the sequences of those grounds of appeal. Argued that, the appellant was not afforded an opportunity to raise mitigation after being convicted. Equally, PW4, a medical doctor did not disclose his professionalism or proper identity and place of work. Thus justified his argument by referring this court to the case of **Samuel Stanley Vs. R, Criminal appeal No. 67 of 2022 HC of Morogoro.**

Arguing on penetration, advocate Banzi briefly submitted that, the victim testified that he was penetrated more than three times, but the prosecution failed to establish who penetrated him for all those three times and importantly is when and time of that penetration. Further, the victim was examined three days after the event, hence the prosecution failed to prove the case beyond reasonable doubt. Justified his argument by referring this court to the case of **Jumanne Daniel Kipandei vs. R Criminal Appeal No. 71 of 2022**. Rested his case by submitting that even the witnesses for the prosecution were not reliable, thus prayed the appeal be allowed and acquit the appellant forthwith.

In turn, the learned State Attorney Ms. Lundu firmly resisted the appeal for the reason that the appellant committed the alleged offence,

and outright she prayed the appeal be dismissed forthwith. She replied jointly grounds 1 & 2 related to the issue of alibi, that the appellant did not raise the defence of alibi during trial, hence prohibited to raise it on appeal. In respect to right of mitigation, the learned State Attorney responded strongly that the ground lacks merits because the trial court's record speaks itself at page 38 of the proceedings. Thus, the appellant was afforded an opportunity to mitigate but he failed to utilize such opportunity. Justified her argument by citing the case of **Oscar John Bosko & Another Vs. R, criminal appeal No. 140 of 2018 (CAT Mwanza)**

Replying to grounds 4 & 5, Ms. Lundu argued that, the prosecution evidence was not contradictory. Due to the nature of the offence itself, the best evidence should come from the victim. Therefore, the key evidence was the victim (PW3). In this point, Ms. Lundu referred this court to the cases of **Goodluck Kyando Vs. R, [2006] T.L.R 363** and **Masayu Kalele Vs. R, Criminal appeal No. 120 of 2017 (CAT).**

Responding to the allegations that PW1 and PW2 gave hearsay evidence, she resisted by insisting that every person is a competent witness to testify in any court of law, unless the court considers otherwise. Supported her argument by referring this court to section **127 (1) of the Evidence Act [CAP. 6 R.E. 2019]**.

In regard to the evidences of the medical doctor, Ms. Lundu replied that he was a reliable witness, distinguished the circumstances of this appeal with the case of **Samuel Stanley (Supra).** Lastly, she prayed this

appeal be dismissed forthwith and the appellant should comply with the sentence passed by the trial court as a result of his offences he committed to the victim.

In rejoinder advocate Banzi prayed to reiterates to his submission in chief. Notably he did not argue some of grounds of appeal particularly ground one and three, however, to commence my consideration I wish to deal with the grounds of appeal in sequence as presented in the petition of appeal.

Stating with the first ground of appeal, related to the defence of Alibi, I think the learned State Attorney Ms. Mary Lundu was right that, the defence of Alibi must be raised during trial, otherwise the appellate court may not have a ground to step in. Rightly so, section 194 (4) of the **Criminal Procedure Act, [Cap 20 R.E. 2022]** requires the accused intending to rely on defence of alibi to give prior notice to the court which notice was not issued before trial and in fact the issue of alibi was not raised at all during trial. For clarity the section is quoted hereunder: -

> **Section 194 (4)** *"Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case."*

Where the accused does not give notice as required by this provision, subsection 5 of the same section comes into play. The subsection give room to the accused to furnish the prosecution with particulars of the alibi at any time before the prosecution case is closed. The subsection provides:

Section.194 (5) *"Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed."*

As rightly argued by Ms. Lundu, the appellant neither issued notice nor furnished any particulars as required by law. No wonder Mr. Banzi despite of raising it as a ground of appeal, but evaded to submit on it, for obvious reason that the ground had no root from the trial court's proceedings. In any event this ground must fail.

Considering the second and third grounds jointly. The complaint that the appellant was not accorded an opportunity to raise his mitigation, I think, this court cannot be tied up on an obvious issue. As rightly argued by the learned State Attorney, the trial court's proceedings speak loudly in page 38 that the trial Magistrate wrote *NIL* under the heading of *mitigation* to show that appellant was given a chance, but did not use it, thus he cannot complain on appeal that he was not given chance to mitigate.

In regard to the third ground, that the trial magistrate did not show the reasons for judgment. This is another ground which was raised as ground of appeal, but the learned advocate Banzi evaded to submit on it. Judgement writing is well developed and in fact, it is settled, I need not to invent a new wheel. Basically, reason for the decision is a fundamental prerequisite in judgement writing. Summary of facts of the case, points for determination, analyses of adduced evidences by both parties, proper

conviction and sentence in accordance to applicable laws. In this appeal, the trial Magistrate at page 12 & 13 of his judgement provided reasons for judgement. There are no strict rules of procedure upon which judges and magistrates must comply when they are composing their judgements, rather every judgement must comprise certain fundamental principles including *ratio decidend* which I find the trial magistrate complied with. Hence these two grounds lack merits same are overruled.

On the last two grounds (4 & 5) the appellant faulted the trial magistrate by considering weak evidences of PW3, which was not corroborated and that the judgement was based on hearsay evidence.

Since these two grounds tries to challenge the authenticity and validity of prosecution witnesses, I find important to consider them wholistically. Always the first appellate court has a legal duty to treat as a whole and exhaustively, the evidence recorded by the trial court. When I am doing so, I am mindful on the danger of stepping on the shoes of the trial court. There are countless precedents of this court and the Court of Appeal on this principle, the following are just few of them; **Shaban Amiri Vs. R, Criminal Appeal No. 18 of 2007; Prince Charles Junior Vs. R, Criminal Appeal No. 250 of 2014; and D.R. Pandya Vs. R, [1957] E.A. 336.** In all those cases, the court repeated that the first appellate court must reevaluate the evidence as a whole and exhaustively scrutinize them, failure to do so is an error of law. The same position was emphasized in the case of **Leonard Mwanashoka Vs. R, Criminal Appeal No. 226 of 2014**, whereas the Court of Appeal held:-

"The first appellate court should have treated evidence as a whole to a fresh and exhaustive scrutiny which the appellant was entitled to expect. It was therefore, expected of the first appellate court, to not only summarize but also to objectively evaluate the gist and value of the defence evidence, and weigh it against the prosecution case. This is what evaluation is all about"

On strength of those precedents, this court endeavor to reevaluate the evidence of both, the prosecution and the defence side as recorded by the trial court, out of that evaluation, this court will arrive into conclusion.

The trial court's records indicates that on the evening of 6/10/2021 the father of the victim (PW1) was informed by one Rosemary Joseph that they heard his son after school is roaming around Maserekali forest with the appellant who is said to have unnatural sex, later on that day he asked his son who admitted that, the appellant had unnatural sex with him once at the forest and gave him Tsh. 1,000/=. In the following morning, the father instructed his wife (mother of the victim (PW2) to report the matter to the village government. Later on, the appellant was arrested and the victim was asked what was he doing with the appellant at Maserekali forest and he replied that "tunafanyaga" meaning that they are doing sex with the victim. When asked how many times he replied three times. When the appellant was asked, he only replied that "this child took my money". PW1 went to police station where they were given PF3, thus the victim was taken to hospital for medical examination.

The said mother of the victim (PW2) disclosed that she heard from her sister Josephine Bernad, who also was told by Rosemary Joseph that, she is suspecting the appellant to have unnatural sex with the victim after seeing them roaming at Maserekali forest. On the following day, she was instructed by her husband to report the matter to the village government and the boy again admitted, but this time he said the appellant had sex with him three times. Consequently, the appellant was arrested. Explaining on what happened to him on 6/10/2021, the victim said that the appellant found him at the forest hold his neck and forced him to lay down and penetrated him while holding knife to threaten him that he will kill him.

In his own testimony the victim (PW3) testified that after he returned from school, he went to take grass from Maserekali forest where the appellant found him took of his clothes, and threatened him with a knife told him to lay down with his stomach and in his own words he said "*akachukua dudu lake akaweka kwenye matako yake*" meaning the appellant took out his pennis and put in his buttocks, "I felt so much pain as he inserted his penis into may buttocks" he said. he further told the court that he prior knows the appellant because he carries luggage at the village. The boy further testified to remember that the appellant committed the offence three different times and he hid the matter because the appellant told him not to disclose it to anyone otherwise, he will kill him. Further testified that, Mama Guro told his father that she saw the appellant having unnatural sex with him, but appellant run away.

PW4 Medical doctor testified that on 8/10/2021 the victim was brought to the hospital about 1800hrs with his father for examination as it

was alleged that he was penetrated unnaturally three days back, he examined the victims' anus and found bruises and delated anus sphincter, stool was also seen at the anus.

G. 9600 Shakiru, a police officer in his witness statement wrote that, appellant admitted to be familiar with the victim that he gives him money and sometimes spent time with him at the Maserekali forest.

Appellant in his brief defence stated that, he was not caught on 6/10/2021 raping anybody but on 8/10/2021 at his home around 1100hrs by local militia man. where he was taken to the village government office whereby, the victim was brough at about 1600hrs, latter he was taken to hospital for examination. They took him to Mgeta Police Station where he stayed in police lockup for 8 days, before he was brought to Dakawa Police Station where he again remained in police lockup for 14 days.

Briefly that was the evidences adduced in court during trial. The trial court found the appellant liable based on those summarized evidences. From the outset, it is evident that, none of the prosecution witness was an eye witness, rather were told by either a passerby upon seeing them in the forest suspected the two having sex. Both father and mother of the victim testified purely on hearsay. The only evidence which may be reliable in the eyes of law is of the victim himself.

Usually in criminal trials, the prosecution evidences are intended to prove the offences preferred by the Republic in the charge sheet. Such credible evidences must link the accused with the alleged offence. In other words, the evidence must point all fingers to the accused, that there is

none but the only one who committed the said offence. Upon final analysis of that evidences, if the case against the accused is well built, unless there is clear explanation to the contrary, otherwise, the court will proceed to convict him and sentence according to the provisions of law.

In this appeal the charge of unnatural offence contrary to sections **154 (1)(a) and (2) of the Penal Code [CAP 16 R.E 2019]** was preferred by the Republic. In fact, section 154 (1)(a) of the Act prescribes the offence of unnatural, while section 154 (2) provide punishment to the convict. During trial the age of the victim was no contested, even in this appeal, the issue of age of the victim is not raised at all. Thus, considering the recapped testimonies of both parties during trial, in line with the preferred sections of law, I think the only question for determination by this court is whether the offence of sex against natural was proven to the standard required by law that is, beyond reasonable doubt.

As right argued by Ms. Lundu, the offence of this nature always the best evidence comes from the victim as per the case of **Selemani Makumba Vs. R, [2006] T.L.R. 379**. I am very well aware of this rule, and I know it is still applicable in our jurisdiction. But it is worth noting that in this appeal, it is apparent that, except PW4 who provided an expert opinion, the remaining witnesses testified purely a hearsay evidence save for the victim himself. In such circumstances, justice requires serious consideration of the victim's truthfulness and credibility of the victim. In the case of **Mohamed Said Vs. R, Criminal Appeal No. 145 of 2017** it was held: -

"We think it was never intended that the word of the victim of the sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with the rules of evidence in general, and s. 127 (7) of Cap 6 in particular, and that such compliance will lead to punish offenders only in deserving cases."

In similar vein, in the case of **Juma Antoni Vs. R, (Criminal Appeal 571 of 2020) [2022] TZCA 250,** the Court of Appeal took the above precedent among others of its previous decisions and insisted that: -

"In the premises, although the best evidence of rape is that which comes from the victim, however, that is not a waiver on the court assessing the credibility in order to satisfy itself that the witness is telling nothing but the truth"

Taking into consideration the above precedents and testing it with the circumstances of this appeal, it is clear in our jurisdiction that, hearsay evidence is not admissible in our courts. Interestingly the prosecution witnesses for the first time they heard from one Rosemary Joseph who also was not certain on the fact in issue. Above all, even Rosemary's statement leaves a lot of doubts because she testified that at Maserekali forest she saw the appellant and victim roaming at the forest, thus suspected them that the appellant was committing unnatural offence. At the same time, PW3 (victim) testified that Rosemary Joseph told his father that he saw them doing the act and he warn them, but the appellant ran away.

In any event the source of information on this appeal was the information from Rosemary Joseph who saw them at the scene of crime. Unfortunate such an important witness, the prosecution did not find her as key and crucial witness to prove the offence. More so, G. 9600 Shakiru a police officer in his statement stated that, he took a cautioned statement, but even that cautioned statement was not tendered in court during trial. The law is settled in our jurisdiction that failure to call key witness who is available within the vicinity is fatal. There is no explanation as to why the prosecution failed to call Rosemary Joseph as a witness and key informer who trigged the whole process of law until the appellant found himself in life imprisonment.

In this appeal and based on the evidences discussed above, it is evident that the only direct evidence is of the victim alone. Therefore, it is necessary for the ends of justice to make close consideration of the victim's truthfulness, reliability and credibility of his testimonies.

Rightly the trial magistrate adhered to the provision of section **127 (2) of the Evidence Act** as amended on recording the evidence of a child of tender age. However, in the whole of victim's evidence, raise crucial unanswered questions when considered together obviously raise serious doubt. For instance, whether the victim was unnaturally abused once or three times? At once he disclosed that he was penetrated by the appellant only ones, but before the village office, he mentioned that it was three times. Second, before the trial court, he testified that the appellant threated him a knife, that he will kill him, but it is not known whether he continued with that threat even after the act and when he was at home

with his mother and other relatives still, he failed to say anything against the appellant. Above all, one may ask what obscured him to tell his teachers and even his students on what the appellant was doing to him? What about other times apart from 6/10/2021 was he also threatened? why didn't he report?

Considering the testimonies of the medical doctor, in relation to the above questions, it is clear the report disclosed that the victims' anus had bruises and sphincter was dilated, stool was also seen at the anus, in simple language if I understood him properly, the victim's anus was open to the extent that he was unable to control his stool. If that was the situation of the victim, the subsequent question is, how was it possible for the parents, relatives, teachers or even classmates failed to notice that something is wrong from the victim. According to the seriousness of the impact of such offence as observed in PF3, many things could be visible from the victim; first it must have affected the way he was walking; second since his anus was open to the extent that stool was visible, subsequently smell must have been sensed by those near to him, but neither his parents nor his schoolmates, nor teachers and whoever noticed any difference to that young boy.

The situation of this appeal has reminded me on the lamentations of this court and the Court of Appeal in many cases that it is very ease to allege on offences related to sex, but is very difficulty to the accused to defend. The court through various cases, has come up with a general rule that, in sexual related offences, the best evidence lies on the complainant. The reason is obvious, usually the offence of rape is committed in a closed

doors with only two persons, or in a deep forest where only the accused and the complainant are involved. In such circumstances, the complainant's evidence stands to be the best evidence. However, such evidence should not be taken wholesome as truth of the matter, nowadays courts have developed some guiding rules to test credibility and reliability of the victim's evidence. For instance, the court should satisfy on the demeanours of the complainant/victim, coherence of his/her statement and consistence to other witnesses in support (Corroboration). Similar position was alluded in the case of **Athuman Hassani Vs. R, Criminal Appeal No. 292 of 2017.**

Moreover, sexual related offences in our jurisdiction are well developed and placed among the most serious offences, which upon conviction attract heavy punishment up to life imprisonment, in any event not less than thirty (30) years imprisonment. Therefore, according to its seriousness of punishment, its proof must as well be watertight leaving no reasonable doubt. Therefore, the prosecution has special task to perform, that is carefully, establishing all relevant elements constituting the offence and carefully proving them with a view to avoid mistakes, having in mind to net only the rapist and punish them properly.

Having in mind all those principles, the question is whether in the circumstance of this appeal, the prosecution dutifully performed its duties? Whether the unnatural offence was committed? If so who committed that offence? Unfortunate all relevant questions of facts and law were not established and proved to the required standard of beyond reasonable doubt.

For the reasons so stated, I proceed to quash the conviction and set aside the sentence of life imprisonment meted by the trial court, consequently I order an immediate release of the appellant unless lawfully held.

Order accordingly.

Dated at Morogoro in chambers this 10th July 2023.

P. J. NGWEMBE

JUDGE

10/07/2023

Court: Judgement delivered at Morogoro in Chambers this 10th day of July, 2023 in the presence of Mr. Samwel Banzi, Learned Advocate for the appellant and the presence of Mr. Josbeth Kitale, State Attorney for the Respondent/Republic.

A. W. Mmbando

DEPUTY REGISTRAR

10/07/2023

Right of appeal to the Court of Appeal explained.

A. W. Mmbando

DEPUTY REGISTRAR

10/07/2023